MOHAMED NOH BIN YAAKOB & ANOR v. HAJI MOHAMED NOOR BIN HAJI YAKUB

[A.C.J. (Syed Agil Barakbah J.) March 5 & May 13, 1979]
[Alor Star — Civil Appeal No. 5 of 1978]

Practice and Procedure — Judgment in default of appearance made by President, Sessions Court — Whether can be set aside by succeeding President Sessions Court — Subordinate Courts Rules, 1950, Order XIX r. 3(3), Order XXXVI r. 19.

In this case judgment in default of appearance was given by the President, Sessions Court, Alor Star against the appellants. Subsequently the President was transferred. An application was made to the new President of the Sessions Court for the judgment in default to be set aside on the ground that the summons was not served on the appellants. The learned President of the Sessions Court held that he had no jurisdiction to set aside the judgment in default of appearance given by his predecessor. The appellants appealed.

Held: where the judgment entered against the defendant is in default of his being present in court during the hearing, by virtue of Order XIX rule 3(3) and Order XXXVI rule 19 of the Subordinate Courts Rules, the succeeding President or Magistrate may hear and, if satisfied on the merits of the application, may set aside the judgment of his predecessor.

Cases referred to:-

(1) *Nacheeppia Chettiar* v. *Gan Eng Kiat* [1965] 2 M.L.J. 25.

(2) *Arjan Singh* v. *Hashim Angullia & Ors.* [1941] M.L.J. 55.

(3) *L.W. Cyris* v. *K.G.A. Gunadasa* [1955] M.L.J. 7.

CIVIL APPEAL.

A. Jayadeva for the appellants.

Kartar Singh for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is an appeal against the decision of the learned President, Sessions Court, Alor Star, on a point of law which he raised as a preliminary issue and decided that he has no jurisdiction to set aside the judgment in default made by his predecessor against the appellants for failing to appear during the proceeding. The judgment given against the appellants (defendants in the court below) was for the surrender forthwith of vacant possession of certain land on the ground that they were trespassers and for payment of damages in the sum of $2,305 and costs. The order was issued on January 10, 1976. On August 16, 1977, the appellants filed the application to set aside the said judgment. The accompanying affidavit, *inter alia*, states that the summons was not served on the appellants. All that they knew about the case was when a judgment notice was served on them on or about July 1977.

The judgment in default was made by the former President, Encik Haidar. When he went on transfer the present President, Encik Yusof Khan succeeded him. He held that he has no jurisdiction to hear the application. He relied on the judgment of Suffian J., (as he then was) in *Nacheeppia Chettiar* v. *Gan Eng Kiat*.[1] It was held that a President of a Sessions Court has no power to set aside the judgment of his predecessor.

A number of authorities were cited before the learned President who concluded that the facts in the present case are not distinguishable from *Nacheeppia's* case and the *ratio decidendi* of Suffian J., (as he then was) is of general application and applies to all cases where judgment is given, whether by default, by consent or a full judgment on merits.

In the light of the above, it is therefore necessary for me to scrutinise the judgment and refer to other relevant authorities and the court rules in order to decide whether the learned President is right.

Nacheeppia's case concerns a judgment by consent of the defendant who appeared in court and admitted the plaintiff's claim for money due and owing on a promissory note. It appeared the plaintiff had not produced a statement of accounts at the time of suing and the pro-note had not been attested. That contravened the provisions of the Moneylenders Ordinance. The learned President who had entered judgment earlier had been transferred and the succeeding President set aside the judgment but subsequently had misgivings and referred the matter to the High Court for revision under section 32 of the Courts of Judicature Act, 1964. *Nacheeppia's* case is distinguishable from *Arjan Singh* v. *Hashim Angullia & Ors.*,[2] also a claim for non-compliance with the provisions of the Moneylenders Ordinance similar to the former. The defendants did not admit the plaintiff's claim but applied to the court to set aside the writ of summons on the ground of non-compliance by the plaintiff with the statutory provisions. The summons was accordingly set aside. The third case worthy of note is *L.W. Cyris* v. *K.G.A. Gunadasa*[3] which was an appeal to the High Court against the refusal of the President, Sessions Court, to set aside judgment given in default in the absence of the appellant. A written defence filed before the application disclosed a good defence on the merits. The judgment was set aside. The original judgment in default and the refusal to set it aside was made by the same President who sat as a Magistrate.

Now, the power of the High Court or a judge to set aside judgment by default is provided by Order 27 rule 15, judgment by default of appearance by Order 13 rule 10 and judgment obtained in the absence of the opposite party at the trial by Order 36 rule 33 of the Rules of the Supreme Court. It is to be noted that in all these rules discretionary power to set aside the interlocutory judgment is given to the court or a judge. If an order for judgment has been made or judgment entered, either in default of appearance to the writ or delivery of pleading or of appearance at the trial, the court or a judge may set it aside upon such terms as to costs and otherwise as the court or a judge may think fit. (See *Halsbury's* Laws of England, 3rd Edition, Vol. 22, page 788, paragraph 1667). I understand that to mean the exercise of such power is not limited only to the judge who has given the judgment but any Judge of the High Court who succeeds him or presides in the absence or in place of the former.

In the case of the Sessions and Magistrates' Courts, Order XIX rule 3(3) of the Subordinate Courts Rules, 1950, provides: —

"Any judgment or order given or made in the absence of a party may, on his application and if good reason for such absence be shown, be set aside and the proceedings may be reheard upon such terms as to costs or otherwise as the

court shall think fit. Notice of such application shall be given to the opposite party."

The rule should be read with Order XXXVI rule 19 which does not limit the inherent power of the court to make such orders as may be necessary to prevent injustice or prevent abuse of the process of the court.

The word "court" appearing in both rules as defined in Order II is wide enough to enable the exercise of the power by the court of competent jurisdiction, i.e. by any President or Magistrate. Presidents and Magistrates, as in the case of the present appeal, often go on transfers and may cease to have jurisdiction. They will not therefore be in a position to perform their judicial functions. Secondly, it will involve time and unnecessary expenses.

With great respect, I think *Nacheeppia's* case refers to a full or final judgment because the defendant appeared in person and admitted the plaintiff's claim. Thereupon an order was entered and perfected. No President or Magistrate can set aside a final judgment unless allowed by statute. Order XIX rule 3(3) of the Subordinate Courts Rules does not therefore arise. The only remedy is to file an appeal against the judgment. Thus Suffian J., (as he then was) stated that the defendant should not have admitted the plaintiff's claim at the time of hearing, if he wanted to avail himself of *Arjan Singh's* case. He should have applied to have the summons set aside to enable the President to act on the authority of that case. He did not do so nor did he file any appeal against the judgment.

In the circumstances I hold that in the present case where the judgment entered against the defendant is in default of him being present in court during the hearing, by virtue of Order XIX rule 3(3) and Order XXXVI rule 19 of the Subordinate Courts Rules, the succeeding President or Magistrate may hear and if satisfied on the merits of the application, set aside the judgment of his predecessor.

Order accordingly.

Solicitors: *Jayadeva & Kamal; Kartar Singh Dhaliwal & Co.*